

**STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT**

**STATE OF NEW MEXICO,**

**Plaintiff,**

**v.**

**No. D-101-CR-2023-00040**

**HANNAH GUTIERREZ,**

**Defendant.**

**STATE'S RESPONSE TO DEFENDANT'S EMERGENCY MOTION FOR  
NEW TRIAL AND RELEASE**

**THE STATE OF NEW MEXICO**, by and through Special Prosecutors Jason J. Lewis and Kari T. Morrissey, hereby submits the following response to defendant's Emergency Motion for New Trial and Release.

Defendant's threadbare motion requests a new trial based on the erroneous distillation and application of a recently issued New Mexico Supreme Court opinion, *State of New Mexico v. Taylor*, 2024-NMSC-\_\_\_, \_\_\_ P.3d \_\_\_ (S-1-SC-38818, March 14, 2024). Although the defendant's motion is thin on facts and argument, the State will do its best to address the issues raised in *Taylor* as it may apply to defendant's jury instructions. On the outset, and as more fully explained below, the defendant's motion attempts to condense a 33-page opinion into the simple premise that any jury instruction containing the conjunctive term "and/or" is facially invalid and entitles her to a new trial. Such a proposition is not supported by a careful reading of the facts and law laid out in *Taylor*, and consequently, defendant's motion should be denied.

As the Court is aware, the defendant made only one objection at trial to the proposed jury instructions in this case, and that objection was to the use of the word “negligent” rather than “reckless” in the jury instruction for the charge of negligent use of a firearm. Defendant raised no objection to instruction 12A, the alternative theory Involuntary Manslaughter charge, asserting that the defendant acted without due caution and circumspection, a copy of which is attached as “**Exhibit B**” to *Defendant’s Motion for New Trial and Release*. Despite not raising an objection to this instruction at trial<sup>1</sup>, or even asserting that it could be confusing to jurors, defendant now asserts the instruction was unlawful based on the holding in *Taylor*.

It is important to understand the facts of *Taylor* before turning to its holding. *Taylor* involved two daycare worker defendants who were charged with and convicted of reckless child abuse after failing to notice that two children in their care were left inside a motor vehicle after a daycare outing on a hot day, resulting in the tragic death of the two children. The jury instructions in that case were complicated. In the jury instruction at issue, the essential element setting forth the alleged acts included four independent acts separated by a single use of the “and/or” conjunction before the fourth and final alleged act. “The State’s requested instruction, adopted fully by the district court, identified four different acts. The district court instructed the jury that to find Defendants guilty of reckless child abuse, it had to find that

[Defendants] did not follow the proper rules and procedures mandated by CYFD in conducting the care of [the Victims], *including* failing to do headcounts, driving [the Victims] without CYFD permission, failing to have [a] proper care giver to child ratio when [the Victims were] in [Defendants’] care, *and/or* failing to remove [the Victims] from a vehicle which resulted in [the Victims] being left unattended in that vehicle and exposed to unsafe temperatures for a time period of approximately two hours and 40 minutes.

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<sup>1</sup> In *Taylor*, the Court found that the defendant in that case objected to the State’s proposed jury instruction at trial, but that the Court nevertheless accepted the State’s proposed instruction, properly preserving the issue for appellate review. Defendant Gutierrez did not object to Instruction 12A at trial, nor did she raise any concern regarding potential juror confusion.

(Emphases added in original.) *Id.*, ¶ 11.

The Court further stated, “...the presence of *and/or* in the all-important conduct element of the essential-elements instructions confused and misdirected the jury and allowed it to make a finding of guilt on a legally inadequate basis.” *Id.*, ¶ 12. Unlike in *Taylor*, the instructions used in defendant’s case were not confusing and were legally adequate.

With regard to potential juror confusion, the Court noted an important distinction between two statements separated by “and/or,” such as the instructions involved in defendant’s case, and more than two statements, like those used in *Taylor*:

Using *and/or* to separate two terms, such as “A and/or B,” invites the reader to choose only A, only B, or both A and B. Thus, a reader is presented with only three options when *and/or* is used to separate two terms.

[However, as] opposed to “A and/or B,” adding an additional proposition, C, can leave a reader guessing whether *and/or* is intended to be placed between all propositions or only some of the propositions. On the one hand, “A, B and/or C” could provide a choice among A, B, C, or any combination thereof, equal to ‘A and/or B and/or C.’ On the other hand, the placement of *and/or* between B and C might suggest that *and/or* is intended to provide a choice between only B and C, with A remaining a constant. In this scenario, the possible choices for the reader end up being A and B, A and C, or all three propositions. .” *Citing to:* Ira P. Robbins, “*And/or*” and the Proper Use of Legal Language, 77 Md. L. Rev. 311, 315, 320 (2018) at 316, 335 (footnotes omitted).

We agree with Professor Robbins that a trial court should not ask a lay jury to unravel such a complex syntactical problem. This fraught endeavor can serve only, and needlessly, to sidetrack a jury from its critical fact-finding role.

*Taylor*, ¶ 14.

In defendant’s case, only two acts were separated by “and/or.” The instruction at issue states, “Hannah Gutierrez loaded live ammunition into a firearm intended to contain only inert ammunition, and/or Hannah Gutierrez failed to perform an adequate safety check of the ammunition she loaded into the firearm[.]” This simple instruction did not require much effort for the jury to understand. The jury could have found that the defendant committed one act or the

other, both, or neither. The inquiry was straight-forward and did not require complicated parsing of syntax, such as requiring the jury to decide between multiple permutations of several acts, as was the case in *Taylor*. This instruction on its face is clear and concise. It would not result in a reasonable juror or jury being confused as to which acts are necessary to convict the defendant. There are but two options and the instructions make clear the jury could have selected one or the other, both, or neither. This instruction is not confusing and not remotely similar to the complex instruction the *Taylor* court found to be unlawful.

Equally important, as the Court notes in *Taylor*, is that each act included in the instructions used at defendant's trial was legally sufficient on its own to support a conviction. Unlike in *Taylor*, defendant's instructions could not result in the jury finding the defendant guilty on an inadequate basis. "In the final analysis, the conduct element instructions, with their complex structure and prominent use of the term *and/or*, on their face, allowed the jury to make a 'decision[] they [were] not allowed to make,' Robbins, *supra*, at 320. That is to say, the jury was allowed to return guilty verdicts *solely* based on one or more of Defendants' alleged CYFD violations. For our analysis, this Court need not dispositively address the legal efficacy of each of the several conviction choices available to the jury under the essential-elements instructions as framed. Instead, it is enough to point out that the jury, as instructed, could have convicted Defendants on the charged felony child abuse crimes for merely failing to obtain agency permission to transport the children to and from a nearby park. This technical violation of the agency's policies could not support a stand-alone finding that Defendants placed the Victims in any 'direct line of danger.' *State v. Garcia*, 2014-NMCA-006, ¶ 10, 315 P.3d 331." *Id.* ¶ 20.

In defendant's instructions, each act was described fully on its own with no requirement that the jury try to mix and match among several acts, and each act could, on its own, support a conviction of involuntary manslaughter. That is, the defendant could have been convicted solely for loading live ammunition into a firearm intended to contain only inert ammunition or she could have been convicted solely for failing to perform an adequate safety check of the ammunition she loaded into the firearm. The jury did not have to parse parts of one act and combine those parts with one or more acts in order to convict. Each on its own warranted conviction.

Finally, the Court recognized the continued applicability of *State v. Godoy*, 2012-NMCA-084, ¶ 6, when it noted, the Court of Appeals "reiterat[ed] that 'where alternative theories of guilt are put forth under a single charge, jury unanimity is required only as to the verdict, not to any particular theory of guilt' and that a 'jury's general verdict will not be disturbed in such a case where substantial evidence exists in the record supporting at least one of the theories of the crime presented to the jury.'" *Taylor*, 2021-NMCA-033, ¶¶ 22-23 (internal quotation marks omitted)." Although the Court ultimately found that *Godoy* did not apply to the instructions in *Taylor*, it was because those instructions on their own were legally inadequate to support a conviction, and not because the validity of recognizing alternative theories can support a finding of guilt under a single charge was flawed. "*Godoy* has no applicability to cases, such as this case, in which one of the alternatives on which the jury is allowed to return a guilty verdict is legally inadequate." *Id.* ¶ 21.

The instructions used at defendant's trial were neither confusing nor legally insufficient. The defendant's assertion that all jury instructions containing the conjunction "and/or" makes them facially invalid is simply not the holding of the Court in *Taylor*. While the Court makes clear that the use of "and/or" should be avoided in jury instructions, the test for determining whether instructions are legally insufficient is far more complex. Indeed, an accurate reading of *Taylor*

makes clear the instructions used in defendant's case are sufficient to support her conviction. For the foregoing reasons, the State respectfully requests this Court enter an order denying defendant's Emergency Motion for New Trial and Release.

Respectfully submitted,

/s/ Jason J. Lewis

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of March 2024, I served the forgoing pleading to all parties or counsel of record:

/s/ Jason J. Lewis

Jason J. Lewis